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ISLAMIC INJUNCTIONS ON PRISONER'S IMMUNITY AND TERMINATION OF CAPTIVITY IN WAR: THE CASE STUDY OF AFGHANISTAN

Muhammad Tariq Ramzan¹, Amir Hayat², and Hafiza Sumera Rabia³

Abstract: The armed conflict in Afghanistan between alliance of International Security Assistance Force (ISAF) and indigenous resistance, has come to an end in August 2021. One of the major issues of this conflict, is termination of war captivity from both sides. Both have their own protocols to solve the matter. The historical human practice to terminate war captivity, persists on five methods: freedom gratis, ransom, exchange of prisoners of war, execution and enslavement. This paper analyses these methods under Islamic International Humanitarian Law (IIHL) and Conventional International Humanitarian Law (CIHL) but main focus will be on prior methodology. According to Islamic legislation, freedom gratis remained the general practice in entire Islamic military history. Contrary to it, ransom and exchange of prisoners of war were occasionally utilized and not the general practice in entire military history of Islam. The execution and enslavement were pre-Islamic methods and practices. A set of Islamic injunctions was revealed to reform those (Execution & Enslavement) and hence they have been invoked as the source of reference in Islamic legislative literature.

Keywords: *War, Prisoners, Immunity, Afghanistan, Islamic Legislation, humanitarian laws.*

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PRELUDE

Since the advent of human existence on this earth, hostilities and wars remained horrendous in human spheres. Myriad military rules in different times have been established by humanity to prevent human beings from sufferings of wars. Recently, an arena in soil of Afghanistan remained since 2001 to 2021. In this armed conflict, NATO alliances (latterly which led from August 2003, the UN-mandated International Security Assistance Force (ISAF))⁴ and regional coalition of resistance under the name of *Ṭālibān* remained encountering each other for almost 20 years. Both have their own stances and intentions in this situation along with clamming a systemized ideology for sustenance of human existence.⁵

In these circumstance, a burning question of the contemporary era which gains exceptional attention is what is immunity of prisoners of war and through which ways, the war captivity be eradicated? This aspect invoked the modern writers to think about on war captivity and its associated debits. The Islamic jurists since the first Islamic century, remained thinking and writing on the matter. Contemporarily, some serious studies tilted to approach the issue of war captivity associated with Islamic jurists and Islamic conduct of war. The essay also approaches the subject related questions in perspective of the POWs. There is legislative discourse among the Islamic jurists about termination of war captivity and options available to the prisoner such as:

1. Freedom gratis without material gains. In Islamic legislative literature, it is called *Mann*.
2. *Fidā'* (ransom alone or with supplements)
3. Exchanging war prisoner
4. Execution
5. Enslavement

⁴ Security of *Kabul* and its vicinities was assigned to ISAF. NATO led the international forces in 2003. The operations under ISAF's, were expended throughout Afghan soil by permission of UN Security Council. More than 130,000 troops from NATO alliances were deployed in this armed invasion on Afghan soil. Retrieved on 05 Sep. 2021 from https://www.nato.int/cps/en/natohq/topics_8189.htm.

⁵ Muhammad Munir, "The layha for the Mujahideen: an analysis of the code of conduct for the Taliban fighters in Afghanistan under Islamic law", *International Review of the Red Cross*, 93:881 (March 2011), 81-102.

6. A comparison between IIHL and CIHL is also given at the end of this study.

LITERATURE REVIEW:

Islamic International humanitarian law at the first time, was codified by Islamic jurist *Muḥammad bin Al-Shyḥānī* as *Kitāb al-Siyar al-Ṣaghīr*. It was a concise version. *Al-Shyḥānī* extended it with caption of *Kitāb al-Siyar al-Kabīr*. This work is a magnum opus in field of Islamic International relations and solution of international conflicts. In modern age, the notable literature has been produced and available. A meticulous work by Majid Khadduri is *“War and Peace in the law of Islam”*.⁶ He also presented his thoughts about the topic as *“Islam and the Modern Law of Nations”*.⁷ Karima Bennouna presented a comparison of humanitarian laws in perspective of Islamic injunctions in his article *“As-Slamu ‘Alaykum? Humanitarian Law in Islamic Jurisprudence”*.⁸ Ahmad Zaki Yamni is enriched reference on the topic. He elaborated humanitarian laws associated with Islam as *“Humanitarian Law in Islam: A General Outlook”*.⁹ This is comparative study of Islamic humanitarian law and international humanitarian law regarding rights of prisoners of war. A renowned Islamic scholar Dr. Muhammad Munir have produced trustworthy work on the subject under caption *“Debates on the Rights of Prisoners of War in Islamic Law”*.¹⁰ He also presented an analysis about SOPs of Afghani’s indigenous resistance as *“The layha for the Mujahideen: an analysis of the code of conduct for the Ṭālibān fighters in Afghanistan under Islamic law”*. This notable work was published at the platform of International Review of the Red Cross. An Egyptian Islamic scholar Dr. Ahmed Al-Dawoody also presented his work in perspective of Conflict in Syria as *“Islamic law and international humanitarian law:*

⁶ Majid Khaddur, *War and Peace in the Law of Islam*, (Baltimore: The John Hopkins Press, 1955).

⁷ Majid Khaddur, “Islam and the Modern Law of Nations” *American Journal of International Law*, 50: 2 (1956), 353-372.

⁸ Karima Bennouna “As-Slamu ‘Alaykum? Humanitarian Law in Islamic Jurisprudence” *Michigan Journal of International Law*, 15:4 (1993-1994), 605-643.

⁹ Ahmad Zaki Yamni “Humanitarian Law in Islam: A General Outlook”, *Michigan Yearbook of International legal Studies*, 7 (1985), 189-215.

¹⁰ Muhammad Munir, “Debates on the Rights of Prisoners of War in Islamic Law” *Islamic Studies*, 49, no. 4 (2010): 463-492.

An introduction to the main principles"¹¹. In his work, he mainly discussed Islamic rules of war, Protection of civilians and non-combatants, usage of permissible weapons in war, Prohibition of mutilation of the enemy, Management of dead bodies in war etc. Anisseh Van Engeland analysed humanitarian laws as "The difference and similarities between international humanitarian law and Islamic humanitarian law: Is there ground for Reconciliation?"¹² Yadeh Ben Ashoor presented his thought on the topic as "Islam and International Humanitarian Law".¹³ In this work, interpretation of Qur'ānic verses about POWs has been discussed but this work failed to provide plethora of references in his work. Sayyid Muṣṭafā Muḥaqqiq presented his work as "Islamic views on Human Rights"¹⁴ Sayyid 'Abul 'Ala Maudūdī also presented his research about humanitarian rights as "Human Rights in Islam".¹⁵ In his book, the rights of prisoners have been discussed as well.

PROBLEM STATEMENT:

In the arena of Afghanistan, it seems that two ideologies i.e. Islamic ideology and western ideology have been encountering each other since 2001 to 2021. During this, casualties and detention of armed forces from both sides have been made in this war. The captive combatants of both sides are human and on human grounds, they should be treated with least human facilities. What are the common grounds to minimize their sufferings and to terminate their captivity on which both armed forces agree to take care?

¹¹ Dr. Ahmed Al-Dawoody, "Islamic law and international humanitarian law: An introduction to the main principles" *International Review of the Red Cross*, 99: 3, (2017), 995–1018.

¹² Anisseh Van Engeland "The difference and similarities between international humanitarian law and Islamic humanitarian law: Is there ground for Reconciliation?", *Journal of Islamic Law and culture*, 10, no. 1 (2008): 81-99.

¹³ Yadeh Ben Ashoor "Islam and International Humanitarian Law", *International Review of the Red Cross*, 20: 215 (1980), 59-69.

¹⁴ Sayyid Muṣṭafā Muḥaqqiq, "Islamic views on Human Rights" (Tehran: Centre for Cultural-International Studies, 2003).

¹⁵ Sayyid 'Abul 'Ala Maudūdī, "Human Rights in Islam" (Islamabad: Da'wah Academy, 1998).

PURPOSE OF THE STUDY:

The purpose of this study is tracing the commonalties for termination of war captivities under Islamic legislation and conventional international humanitarian law to minimizing the human sufferings regarding imprisonment of war.

LIMITATION OF THE STUDY:

Due to time constraint, this study deals with legislation of termination of war captivity incorporate with Principles of Islamic international humanitarian law and conventional international humanitarian law in perspective of Afghanistan. The other related debates such as protection of civilians and non-combatants, prohibition against indiscriminate weapons, prohibition against indiscriminate attacks, protection of civil property in war zone, prohibition against mutilation, civic provision to prisoners of war etc. have not been mainly discussed, although at some places these have been partially discussed.

CONCEPT OF PRISONER OF WAR (POWS)

According to legislation and jurisdiction, a war prisoner (abbreviated as P.O.W.) is militant who is arrested as captive in war zone by a military or confrontational power during active hostility or after cessation of armed encounter. The position of military or belligerent power may be offensive or defensive. This term POWs was earliest recorded in 1630.¹⁶

FOUNDATIONS OF ISLAMIC LAW

Derivation of Islamic injunctions are based on two chief sources which are primary sources and subsidiary sources. The primary sources persist on *Qur'ān*, prophetic narrations and hagiography (Ḥadīth & Sunnah), *Ijmā'* (legitimate text founded on consensus of opinion) and *Qiyās* (Analogical principles).

¹⁶ Norman Davies, *Europe at War 1939–1945: No Simple Victory* (London: Pan Books, 2006), 271.

Subsidiary sources persist on numerous jurisprudential avenues for developing Islamic laws. These are Juristic preference (*Istiḥsān*), Public Interest (*Mṣālīh Mursalah*), Custom (‘*Urf*), Legal Juridical application of religions before advent of Islam (*Sharāi ‘Min Qblana*), *Āsāri-e-Ṣaḥābah* (Jurisdictions of the Prophet’s Companions), Obstructive the means (*Sadd al-Zarā’i*) and *Istiṣḥāb* (Continuation of the applicability of a previous accepted rule).

ISLAMIC LEGISLATIVE TERMS ABOUT ARMED CONFLICT:

In Islamic legislation about armed expeditions, there are numerous terms the true spirit of which must be known before pondering on the solution of the armed conflicts. These legislative terms are classified in two basics: International armed conflicts (IACs) and Non International armed conflicts (NIACs). A short description of these terms are being mentioned in following:

- As per Islamic legislation, international armed conflict is generally called *Jihād* which is applied in armed conflict of Islamic state and non-Muslim state or belligerents.
- Non International armed conflicts (NIACs), according to the Muslim jurists, persist on four classifications: Wars of renunciation or apostasy (*Ḥurūb al-Riddah*), Fighting against rebels or secessionists (*Qital al-Bughah*), Fighting against terrorists or robbers (*Hirābah*) and armed effort against violent religious fanatics (*Qital al-khawārij*).

In Islamic international humanitarian law, dissimilarity among these armed conflicts is essential to know as Islamic legislative injunctions about these armed conflicts and the captives differ from one category to another.¹⁷

QUR’ĀNIC INJUNCTIONS ABOUT IMPRISON IN ARENA:

Frist and foremost significant is that according to the Islamic jurisprudence, captivity of prisoners of war is legal as it mentioned in *Qur’ān*: “And take them captive, and besiege

¹⁷ Ahmed Al-Dawoody, “Al- Sarakhsi’s Contribution to the Islamic Law of War”, *UCLA Journal of Islamic and Near Eastern Law*, 14, no.1 (2015): 37–43.

them”¹⁸ and “And then tighten their bonds”.¹⁹ Muslim jurists refers the decision of war captivity to discretion of the political authority in interest of Islamic state. However, a difference of opinion among Islamic jurists exists about the options available to Islamic state to terminate the war captivity.

TERMINATION OF WAR CAPTIVITY & ISLAMIC LEGISLATIVE DISCOURSE

In Islamic legislation, there are numerous principles about the prisoner’s immunity and termination of the captivity. Summarizing the principles about termination of captivity in war, comprises on five methods which are respectively freedom gratis (*Mann*), ransom (*Fidā’*), exchange of POWs, Execution and enslavement.

Zāhiriyyah and *Imām Awzā’ī* refer five ways which are accordingly (i) execution, (ii) enslavement, (iii) ransom, (iv) setting conditional freedom. *Malikī* jurists give options with this hierarchy: (i) execution, (ii) enslavement, (iii) freedom with conditions, (iv) ransom (*Jizyah*)²⁰ *Al-Hillī* (of the *Shi’ah Imamiyyah*) is of view that the *Imam* has only three options: Freedom Gratis (*Mann*), Ransom (*fidā’*) and enslavement.²¹ The *Shi’ī*’s legislators restrict execution in captivity.²² In preceding discourse, these are being briefly discussed.

FREEDOM GRATIS:

Entire Islamic military history is witness on that freedom gratis is general practice to terminate the captivity in war. In this regard, the act of *Prophet Muḥammad* (peace be upon him) and his rightly guided successors about termination of war captivity has significant guidance. Due to time shortage stricken, few precedents are being presented

¹⁸ Al-Qur’ān 9: 5, Tranlation of the verses of Quran in this work is by Muhammad Asad, The Message of the Quran (Wiltshire: Dar Al-Andalus, 1984).

¹⁹ Al-Qur’ān 47: 4.

²⁰ Abū ‘I-Walīd, Muḥammad bin Aḥmad bin Rushd, “*The Distinguished Jurist’s Primer: A Translation of Bidāyat Al-Mujthid*”, henceforth, *The Distinguished Jurist’s Primer*, trans. Imran A.K. Nayazī (Reading: Garnet Publishing Ltd. 1994), 1: 456.

²¹ Al-Ḥilālī, *Sharā’i’ al-Islām* (Cairo: Dār al-Kutub al Miṣriyyah, 1996), 1:250-251.

²² A’zamī, Muḥammad Muṣṭafā, *Studies in Ḥadīth Methodology and Literature*, (Indiana: Indianapolis, 1997), 151.

on granting freedom gratis to POWs without taking any materialistic gains as: *Thumamah b. Athal* along with his fellow eighty fighters were granted freedom without any material gain.²³ The armed core of *Hawāzin*, *Banū 'A-Muṣṭalaq*, *Ḥunayn*, *Banū 'l-Anbār*, and *Banū Fazārah*, were granted freedom after surcease of active hostilities. *Abū Bakr*, the first Caliph after the Prophet *Muḥammad* (PBUH) released *Al Ash'ath b. Qays* (d. 35/656). *Hurmuzān* (d. 23 AH/643 AD), the *Sāsānian* army commander was arrested and brought to the second Caliph of Islam. On the request of *Hurmuzān*, he was released by the caliph.²⁴ He also set free thousands of Iraqis when that country was conquered and he decided to impose *jizyah* on them. *Abu 'Ubayd* argues that ransom was taken only from the POWs of *Badr* and was never taken again. Later on the Prophet used to pardon the prisoners.²⁵

“The later precedent from the Prophet (peace be upon him) is to be acted” he says, and as we know, the practice of pardoning by the Prophet belongs to the period after *Badr*.²⁶ This shows that the general practice of the Prophet (peace be upon him) and his Caliphs was to set POWs free without any condition.

RANSOM:

According to *Qur'ānic* guidance, ransom is also an option as mentioned in verse 47:4. As per exegesis of this verse by authoritative commentators, this verse was revealed on battle of *Badar*:

²³ Yaḥyā bin Sharaf al-Nawawī, *Sharah Ṣaḥīḥ Muslim* (Cairo: Maṭba'at Maḥmūd Tawfiq, n.d.), 7:463.

²⁴ He was arrested by *Abū 'Ubaidah*, the Muslim commander, and was sent to 'Umar who spared him despite the fact that *Hurmuzān* had killed *al-Barā' bin Mālik* and *ibn Thawr al-Sadūsī*. For more detail, see: *Al-Shybanī, Kitāb al-Siyar al-Kabīr*, (Riyāḍ: Dār al-Salām, 2006) 2: 49.

²⁵ *Shibli Nu'mānī and Sayyid Suaimān Nadvī, Sīrat al-Nabī* (Lahore: Al Faisal Nāshirān, n.d.), 1: 252-53.

²⁶ *Al-Balādhurī, Kitāb Futūḥ al-Buldān*, Trans. Francis Clark Murgotten (New York: Columbia University, 1924), 2:116-120.

*“Now when you meet (in war) those who are bent on denying the truth, smite their necks until you overcome them fully, and then tighten their bonds, but thereafter (set them free), either by an act of grace or against ransom, so that the burden of war may be lifted.”*²⁷

This verse narrates captivity as a provisional condition, which must give rise to either unconditional or conditional freedom or freedom bought with ransom.²⁸ *Abū ‘Ubaīd al-Qāsim b. Sallām* (d. 229/837) reports that the verses 8: 67-8 were revealed on the day of the Battle of *Badr* when Muslims were numerically weak. When the Muslims increased in number and their power grew, Allah Almighty revealed: “set them free” either by an act of grace or against ransom, so that the burden of war may be lifted.²⁹

Since this was the first time that the Prophet (peace be upon him) had faced this situation, he consulted his Companions. The majority opined that they be ransomed because the Muslims needed material help at that time. *‘Umar b. al-Khaṭṭāb*, however, pleaded that they be executed. The real problem was that there was no clear Divine directive regarding POWs. The Prophet followed the advice of the majority.³⁰ It is reported by *‘Alī b. Abī Ṭālib* (d. 40AH/661AC) that the Prophet (peace be upon him) put two options before his Companions.³¹ In another *ḥadīth* regarding the spoils of war, the Prophet (peace be upon him) states that “he has been blessed with five things which were not bestowed on any Prophet before him, One of these is that spoils acquired from disbelievers, were not lawful for others, but they were made lawful for his community.” However, no revelation attesting to it being lawful had been made till then.³² Thus, when the Prophet (peace be upon him) decided to ransom the POWs of *Badr*, the verses 8: 67-68 revealed. Allah Almighty told him:

It is not for a Prophet to have captives until he has widely exhausted the enemies in the land. You (O believers) seek the fleeting gains of the present, worldly life, but God wills that the

²⁷ Al-Qur’ān 47: 4.

²⁸ For more interpretation see: Muḥammad b. Aḥmad al-Qurṭubī, *Al-Jāmi’ li Aḥkām al-Qur’ān* (Cairo: Dār al-Kutub al Miṣriyyah, 1950), 9:150.

²⁹ Abū ‘Ubayd bin Sallām, *Kitāb al-Ammwāl*, (Cairo: Maṭba’at al-Minār, 1346 AH), 4: 221.

³⁰ Muslim bin Ḥajjāj, Ṣaḥīḥ Muslim, *Kitāb al-Jihād wa ‘I-Siyar, Bāb al-Imdād bi ‘I-Malā’ikah*, (Riyāḍ: Dār al-Salām, 1998), 782.

³¹ Mufti Muhammad Shafi’, *Ma’āriful-Qur’ān* (Karachi: Maktaba-e-Darul-‘Ulūm, n.d.), 4: 274.

³² Abū ‘Abd Allāh Muḥammad bin Ismā’īl al-Bukhārī, Ṣaḥīḥ al-Bukhārī, *Kitāb al-Ṣalāh, Bāb Qawāl al-Nabī* (Riyāḍ: Dār al-Salām, 1999), 76.

Hereafter will be yours. God is All-Glorious with irresistible might, All-Wise. Had there not been a previous decree from God (concerning that gains of war are lawful and captives can be released in return for ransom), a tremendous punishment would surely have touched you because of what you took (the gains of war, and the captives taken in expectation of ransom, before the enemies' power in the land had been sufficiently suppressed and exhausted).

Some of the companions of the Prophet (PBUH) are of view that it might be possible to embrace Islamic when a pagan captive be released without any material gain. One thing must be in front of us that in absence of a decisive textual evidence proving the spoils were permissible, the slightest turn of thought towards material gain was considered an act of disobedience. This verse simply urges Muslims to fight hard during the war and that there should be no captives for Muslims before strenuous bloodshed that is killing the enemy and weakening them thus, it is to emphasize killing of non-Muslims in war. *Imām Fakhr al-Dīn al-Rāzī* (d. 606/1210) in *al-Tafsīr al-Kabīr* argues that the warning given in the verse above does not mean that captives shall not be taken at all.³³

LEGISLATIVE DISCOURSE ON RANSOM AND EXCHANGE OF PRISONER:

Regarding ransom, there is a jurisprudential discourse among Islamic jurists of four *Sunni* school of thought. In this section the opinions of Islamic Jurists/legislators regarding ransoming POWS are discussed. The *Ḥanafī* legislators disagree on ransom (*fidā'*) or releasing them by charging them money. *Abū Ḥanīfah* does not allow ransom (releasing them for money) because this will strengthen the hostile power and also because the *Qur'ānic* verse 9:5 calling for the killing of the enemies is general in its meaning. It says, "And so, when the sacred months are over, slay those who ascribe divinity to aught beside *Allāh* Almighty wherever you may come upon them, and take them captive, and besiege them, and lie in wait for them at every conceivable place." However *Abū Yūsuf* and *Shaybānī*³⁴ allow it. *Shaybānī* agrees to this if the necessary. Both

³³ Fakh al-Dīn al-Rāzī, *Mafātīḥ al-Ghayb* known as *al-Tafsīr al-Kabīr* (Cairo: Maṭbu'āt al-Khayriyyah, 1307 AH), 15:200.

³⁴ 'Alā' ud-Dīn Abū Bakr al-Kāsānī, *Badā'i' al-Ṣanā'i'* (Beirut: Dār Iḥyā' al-Tuārth al-'Arabī, 2000), 6: 95.

agree to exchange POWs with POWs of the enemy. The *Ḥanāfi* scholars argue that verse 47: 4, which mentions freedom gratis and ransom (*fidā'*) is superseded; nevertheless, they agree at the same time that *fidā'* (ransom) is allowed if the political authority considered it to be appropriate or if the Muslims were desperate and needed money.³⁵ According to *Imām Mālik b. Anas* (d. 179/795), *Muhammad b. Idrīs al-Shāfi'i* (d. 204/820), *Sufyan b. Sa'īd al-Thawrī* (d. 161/778) and *Abū 'Abd al-Rahmān al-Awzā'i* (d. 157/774) ransom is one of the options available to the political authority. *Abū 'Ubaīd* differs with them saying that the Prophet (peace be upon him) exercised this option only once in his life. He ransomed the POWs of the battle of *Badr* discussed above and only a few of them bought freedom with money whereas those who could not pay were required to teach Muslim children as payment get their freedom. His latter practice was that of *mann* (setting them free gratis), and this latter precedent shall prevail. This view has the support of '*Abd Allāh b. 'Abbās* (d. 68/687), '*Abd Allāh b. 'Umar*, *Ḥasan al-Baṣarī*, and '*Aṭa b. Abi Rabaḥ*.³⁶

EXECUTION & LEGISLATIVE DISCOURSE:

As for as execution of the war prisoners in Islamic military principles, is concerned, the prophet of Islam (PBUH) executed only three persons entire his life. They were *al-Naḍar ibn al-Ḥārith* and '*Uqbah ibn Mu'ayt* at the battle of *Badr* in March 624 AD,³⁷ and *Abū 'Azzah al-Jumahlī* at the battle of '*Uḥud* in March 625 AD. According to Islamic historical evidences, *Abū 'Uzzah* was first taken captive at the battle of *Badr*, then in response to his request to be freed because he was a poor man with a large family, the Prophet (PBUH) released him on condition that he would never fight against the Muslims again. Contrary to his promise, he breached it and when he was captured a second time the following year at the battle of '*Uḥud*, he was executed.³⁸ Regardless of the authenticity of these accounts, and whether these prisoners were killed during hostilities or after their capture, it is clear that these three individuals had committed

³⁵ Al-Shybanī, *Kitāb al-Siyar al-Kabīr*, 2: 300.

³⁶ Abū 'Ubayd, *Kitāb al-Amwāl*, 116, 120.

³⁷ Muḥammad ibn 'Umar al-Wāqidī, *Kitāb al-Maghāzī*, ed. Muḥammad 'Abd al-Qādir 'Atā, (Beirut: Dār al-Kutub al-'Ilmiyyah, 2004), 135, 263.

³⁸ Muḥyī ud-Dīn ibn Sharaf al-Nawawī, *Al-Majmū' Sharḥ al-Muhadhdhab*, ed. Maḥmūd Matraji, (Beirut: Dār al-Fikr, 2000), 2: 83.

heinous crimes against Muslims and Islamic state before their captivity, hence they were not simply POWs.

Mujāhid b. Ja'ibr (d. 103/721), *Muḥammad bin Sirīn* (d. 110/728), *'Abd al-Malik bin 'Abd al-'Aziz bin Jurayj* (d. 150/767), *'Atā' bin Abī Rabāḥ* (d. 114/732) and *Abu 'Ubayd bin Sallām* were against the execution of POWs.³⁹ In opinion of *'Imād al-Dīn Ibn Kathīr* (d. 774/1373), "the head of the Muslim state has to choose between freedom gratis and ransom only. Execution is not permitted."⁴⁰ *Ibn-e- Rushd* (d 594/1198) have the similar view about execution of POWs. He also attributed the similar view to *Al-Ḥasan al-Tamīmī* (d. 656/1258) about consensus (*Ijma'*) of the Companions on prohibition of execution of POWs.⁴¹

Legislators of *Ḥanafī* school of thought argue that the political authority has three options to terminate the captivity of POWs. These are execution, enslavement, and setting them free with the condition that they should pay *Jizyah* (poll-tax). There is disagreement among them about ransom.⁴²

Al-Ḥasan b. Muḥammad al-Tamīmī is of view that the Companions of the Prophet (peace be upon him) were unanimous on the prohibition of the killing of POWS." *Ibn Rushd* agrees with this opinion. many classical jurists such as *'Abd Allāh b. 'Umar* (d. 73/692), *Al-Ḥasan al- Baṣri* (d. 346/957), *'Aṭa' b. Abī Rabāḥ*, *Ḍaḥḥak b. Muzahim al-Hilālī* (d. 100/718) and *Isma'īl b. 'Abd al-Raḥman al-Suddi* (d. 127/744)." *Muhammad b. Ahmad al-Qurṭubī* (d. 671/1272) mentions that, according to these scholars, verse 47: superseded verse 9: 5, thus the political authorities are not allowed to kill POWS at all.⁴³

ENSLAVEMENT:

Enslavement of Prisoners of war is also an option for detaining power. *Abū 'Ubayd* is of view that enslaving POWs was not the practice of the Prophet (PBUH). *'Umar b. al-*

³⁹ Abū bakar al-Jaṣṣāṣ, *Aḥkām al-Qur'ān*, (Beirut: Dār al-Fikr, 2001), 3: 582.

⁴⁰ 'Imād al-Dīn Ibn Kathīr, *Tafsīr al-Qur'ān al-'Aẓīm* (Cario: Maṭba'at al-Minār, 1346 AH), 4: 221.

⁴¹ Abū 'I-Walīd ibn-e-Rushd, *The Distinguished Jurist's Primer*, 456.

⁴² 'Alā' ud-Dīn Abū Bakr al-Kāsānī, *Badā'i' al Ṣanā'i'* (Beirut: Dār Iḥyā' al-Tuārh al-'Arabī, 2000), 6: 94.

⁴³ Al-Qurṭubī, *al-Jāmi' li Aḥkām al-Qur'ān*, (Riyāḍ: Dār al-Salām, 1998), 8: 151.

Khattāb liberated the slaves of pre-Islamic times and returned them and their children to their relatives. He paid 400 *dirhams* or five camels per slave and set them free and said “An Arab shall not be enslaved”⁴⁴. Hence it shows that enslavement was not a common option. According to enslavement of *Banū Qurayzah*, it is beyond the Islamic principles of war because the enslavement of the women and children of *Banū Qurayzah* was the result of arbitration. The Prophet (peace be upon him) did not enslave the POWs in other battles. Caliph ‘Umar’s opposition to enslavement is well-known. It is quite surprising that the majority of Muslim scholars argue that the enslavement of enemy’s women and children is one of the options available to the Muslim ruler, in addition to *mann* and *fidā’*. However, to support their view they cite only one single incident i.e. of *Banū Qurayzah*. The decision of the arbitrator was only for that specific case and was binding on the parties only. It cannot be extended beyond that. In addition, this decision was according to the Jewish laws as explained above and this is why they accepted the decision.⁴⁵ Another possible reason for their enslavement was that they had no one to take care of themselves. Therefore, enslavement was better option for the women and children of *Banū Qurayzah* in those circumstances but this decision cannot be extended to other situations. According to *Wahbah al-Zuhayli*, the enslavement of women and children was based on reciprocity and this custom existed from pre Islamic times. Islam only reformed this option and set a certain restriction on enslavement of the women and children.⁴⁶

EXECUTION OF POWS: EXCEPTION OR A GENERAL RULE?

Whatever the case, it is undeniable that both ransom and exchange of the POWS were practiced by the Prophet (peace be upon him) himself when he exchanged one non-Muslim with two Muslim captives, similarly, he exchanged a non-Muslim woman with many Muslim captives. According to orthodox Islamic Jurist *Muhammad b. al-Ḥasan al-Shaybānī* (d. 189/804), who codified the corpus juris of *Ḥanafī* school, freeing POW is allowed if the political authority considers it to be in the interest of the community because the Prophet (peace be upon him) had set *Thumāmah bin Athil* (d. 11/633) free. The *Ḥanafī* scholars also agree that non-Muslim POW may all be freed provided both

⁴⁴ Abū ‘Ubayd, *Kitāb al-Amwāl*, 135.

⁴⁵ *Ibid.*, 117-118.

⁴⁶ Al-Shaybānī, *Kitāb al-Siyar al-Kabīr*, 1: 213.

their persons as well as land are subjected to *jizyah* and *kharāj* respectively as 'Umar b. al-Khaṭṭāb (d. 23/644), the second caliph, did with the people of Iraq. Thus, the Ḥanafīs leave the fate of POWS to the discretion of the political authority, expecting it to do what is best for the Muslim community.⁴⁷

IIHL AND POW'S IMMUNITY:

Islamic law contains very liberal provisions about the treatment of POWS during captivity. During subjugation of Makkah, the Prophet (PBUH) announced general amnesty for everyone who put down his arms but excluded seven to nine persons,⁴⁸ all of whom were accused of callous and horrendous crimes against the Muslim state and its citizens before their captivity.⁴⁹ However, only one person, 'Abd Allāh b. Khatam was executed. He had been Muslim and a Companion of the Prophet (peace be upon him) in Madinah and was sent by him to collect *Zakāt* from certain tribe. The Prophet (peace be upon him) sent a servant with him to serve him. 'Abd Allāh killed that servant on the pretext of having cooked bad food for him, went to Makkah, renounced Islam, embezzled the money he had collected and bought two concubines who would sing blasphemous songs against Islam and Muslims. He opened a new front of animosity and hatred against Muslims and joined the enemy, thus committing high treason. He was executed, probably also because he did not apologize for his hateful actions. The Prophet (peace be upon him) might have pardoned him as well like so many others who mended their ways. All other persons wanted by the Muslim state, were pardoned by the Prophet (peace be upon him) when they or their next of kin approached the Prophet for pardon. The Prophet (peace be upon him) divided the captives of POWs of *Badr* among his Companions asking them to, "Take heed of the recommendation to treat the prisoners fairly." Consequently many Muslim families remained content with dates and offered the prisoners the best food they had while they ate only the dates.⁵⁰ The Qur'ān praises

⁴⁷ Al-Shybanī, *Kitāb al-Siyar al-Kabīr*, 6: 101.

⁴⁸ *Ibid.*, 1: 115.

⁴⁹ Ibn Kathīr, *Al Bidāyah wa 'l-Nihāyah*, 6: 297-299.

⁵⁰ Shibli and Nadvī, *Sīrat al Nabī*, 1: 311.

their conduct.⁵¹ Food and milk were brought from the house of the Prophet Muhammad (PBUH) for *Thumāmah bin Uthāl*.⁵²

GUIDANCE UNDER CIHL⁵³:

In this section, POWs, who are accused of crimes against the state and of war crimes of the type mentioned above, can be prosecuted under Conventional International Humanitarian Law (CIHL) or not? The Geneva Convention III relative to the Prisoners of War of 1949 adopted a similar view in its Article 15 which gives the detaining power the right to prosecute a POW for acts committed prior to his captivity against (the Detaining power's) law. Under Article 118 of the Geneva Convention III, the prisoners of war shall be released and repatriated without delay after the cessation of active hostilities.⁵⁴ However, there is always a problem with the interpretation of cessation of active hostilities. Releasing POWs on promise is possible, under Article 21 of Geneva Convention III, if the laws of the Detaining Power allow the same, for the release on parole or promise. Article 21 states that the prisoners released under these conditions will be bound, on their personal honour, to scrupulously fulfil, both towards the Power on which they depend and the Power which has captured them, the engagement of their paroles or promises. Thus, honesty is very essential to the successful application of humanitarian rules. Under Article 109 and 110 of the Geneva Convention III relative to the Prisoners of War, sick, wounded-who are not likely to recover within one year may be repatriated during the hostilities. Thus, any armistice agreement, or any suspension of hostilities for an indefinite period, entails the obligation to release and repatriate POWs.⁵⁵

⁵¹ Al-Qur'ān 76:8-9.

⁵² Muḥammad bin 'Alī al-Shawkānī, *Nayl al-Awṭār* (Cairo: Al-Maṭb'ah al-'Uthmāniyyah, 1957), 7: 303.

⁵³ Conventional International Humanitarian Law is abbreviated as CIHL.

⁵⁴ For more detail: Articles 109 and 111 of Geneva Convention 3rd of 1949.

⁵⁵ Death sentence for a POW is discussed in Article 100 of Geneva Convention 3rd of 1949. For more detail, see: A. Roberts and R. Guelff, *Documents on the Laws of War* (Oxford: Clarendon Press, 1982), 215-270; Nigel Rodley, *The Treatment of Prisoners under International Law* (Oxford: Clarendon Press, 1987).

RECOMMENDATIONS:

The recommendations being presented, prove effective in mitigating sufferings of POWs during armistice or after cessation of hostilities:

- The contemporary dire need is to promote learning and understanding of humanitarian laws in both the eastern and the western educational and research institutes like the American schools of oriental research (ASOR), Rand Corporation etc.
- Academic researches emphasizing on rights of war prisoners must be promoted in academic circles. This should include, for example, encouraging the teaching of IHL at law schools, armed forces like military and police academies in sovereign states of the world at both undergraduate and post-graduate level.
- The power corridors must Approach intellectual locus of contemporary armed conflict and the current challenges in this area rather than focusing mainly on the historical challenges treated in classical cultural scholarship. Researchers, religious personalities, academics, policy makers and think tanks should pay attention on this direction.
- It is dire need for nurturing public awareness in society to promote a culture of equality and respect for human rights. On the other hand, it needs to disgrace the behavior of combating and sanctioning racist and extremist, sectarian and opinions that incite xenophobia.

CONCLUSION:

The main focus of this study is to address options available to a prisoner of war to end his captivity of war, in perspective of Islamic International Humanitarian Law (IIHL) and Conventional International Humanitarian Law (CIHL) in context with war on terror in Afghanistan since 2001 to 2021. According to both international laws, there are five options to end the captivity of war respectively freedom gratis, *Ransom*, *exchange of POW with POW*, *execution* and *enslavement*.

According to the Qur'ānic injunctions, there are mainly two methods to end war captivity which are freedom gratis and ransom. In interpretation of the verses preceded above, there is a difference of opinion among the classical Muslim jurists regarding the

destiny of POWs. According to 'Abū Ubaīd, ransom was only taken from the POWs of *Badar* and was never taken again. After this incident, general practice of the Holy Prophet was to forgive war prisoners. As per his argument: "The subsequent instance of the Prophet (peace be upon him) will be followed." Later on, his (PBUH) successors' action was to set POWs free without taking any material gains. The death sentence of few POWs during all the armed expeditions of the Prophet of Islam (PBUH) was because of severe criminalities they had committed against nascent Islamic state before their captivity. Slaying to death of the combatants of *Banū Quraīzah* was the result of arbitration between the Jews and the Muslims. Few things must be remembered regarding this arbitration. First: *Sa'd bin Mu'āz* as the arbitrator was chosen by *Banū Quraīzah*. Second: this arbitration judgment was based on injunctions of Judaism only. According to Ḥanafī jurist *Abū Yūsuf* and *al-Sarakhsī*, the power to decide execution for war prisoners is entitled to the state head. This power cannot be exercised by the chief command of the state armed forces. These ample evidences makes it clear that execution is not a general rule in Islamic law of war. The similar conduct by International humanitarian law of Geneva Convention 3rd is also prescribed in 1949 for the Prisoners of Second World War in its Article eighty five. The compendium of which is that the Detaining power has right to prosecute a war prisoner for crimes committed prior to his captivity against the Detaining Power's law.

As for as the ransom is concerned, the general conduct of the Prophet of Islam (PBUH) and *Khulafā-e-Rāshidīn* was to grant freedom to POWs without any ransom. In some situations, it may be accepted. The act of 'Umar bin 'Abd al-'Azīz is a precedent of paid ransom. In his time, he prescribed ransom paid to the Greeks to secure the freedom of citizen of Islamic state which were imprisoned by the Greeks. It means that non-Muslim states may also ask for ransom to release their citizen which might be imprisoned as POWs by Islamic state.

As for as Exchanging POW with POW is concerned, this method was utilized occasionally in Islamic military history. Enslavement of POWs had not been an option exercised by the Islamic state. The two examples in this regard do not belong to Islamic Jurisprudence. First example is to enslave the women and children of *Banū Quraīzah*. As discussed above, the enslavement of *Banū Quraīzah* was the result of the arbitration

judgment. Second example of enslavement is that of *Hwāzin* and *Banū Muṣṭalaq*. In their case, freedom of the POWs was granted without taking any materialistic gains.

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